

BEFORE THE STATE ENGINEER OF THE STATE OF UTAH

IN THE MATTER OF CHANGE APPLICATION )

NUMBER 91-372 (a18520) )

MEMORANDUM DECISION

Change Application Number 91-372 (a18520), in the name of Sunnyside Cogeneration Associates (SCA), was filed on December 1, 1994, to change the point of diversion, place and nature of use of 5.575 cfs of secondary water defined in the Whitmore Decree. Heretofore, the water has been diverted from Grassy Trail Creek at the following points: 1) South 2824 feet and West 1166 feet from the N $\frac{1}{4}$  Corner of Section 7; 2) South 1163 feet and West 644 feet from the NE Corner of Section 18; 3) North 1521 feet and West 1983 feet from the SE Corner of Section 29; all T14S, R14E, SLB&M; 4) South 1013 feet and East 125 feet from the W $\frac{1}{4}$  Corner of Section 1; 5) North 1604 feet and East 1245 feet from the SW Corner of Section 2; 6) North 750 feet and West 1345 feet from the SE Corner of Section 3; 7) South 566 feet and East 4323 feet from the NW Corner Section 9; 8) South 1149 feet and East 1320 feet from the NW Corner of Section 9; all T15S, R13E, SLB&M; and 9) North 91 feet and East 2390 feet from the W $\frac{1}{4}$  Corner of Section 6, T15S, R14E, SLB&M. The water has been used as a supplemental supply for the irrigation of 932.40 acres (limited to the sole supply of 350.0 acres), supplemental use for the domestic purposes of 875 families, municipal use in Sunnyside, and industrial uses at the Horse Canyon, Sunnyside, and Columbia Coal Mines.

Hereafter, it is proposed to divert and use the water as heretofore, and for year-round power generation purposes at the SCA 58-MW steam electric generation plant located within the E $\frac{1}{2}$ SW $\frac{1}{4}$ , W $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 6, T15S, R14E, SLB&M. The water will also be stored annually in the 125 acre-foot SCA Reservoir, and the 52 acre-foot Dragerton Reservoir, both located with the SW $\frac{1}{4}$  of Section 6, T15S, R14E, SLB&M. The water may also be used by agreement at the ECDC Landfill.

This application involves the same water as that approved under Temporary Change Application Number t18432 (91-Area). The applicant is proposing to continue to divert this right from Grassy Trail Creek for the aforementioned uses. The water will be diverted from the Creek by means of concrete diversion dams, pipelines, and ditches.

The application was advertised in The Sun Advocate from December 22, 1994, to January 5, 1995, and was protested by Paul B. Martinez, City of East Carbon, and the State Director, Regional Solicitor and Price River Resource Area Manager of the Bureau of Land Management.

A hearing was held on May 5, 1995 in Price, Utah. The applicant was represented by their Utah Council, Mr. Fred Finlinson. The protestants, Dr. Paul B. Martinez, and Mayor Paul Clark of East Carbon City were also present. The Bureau of Land Management was represented by Mr. A. Scott Loveless, Office of the Regional Solicitor, and others.

Speaking in behalf of the applicant, Mr. Finlinson indicated that Sunnyside Cogeneration Associates (SCA) was purchased in January of 1995 by NRG and Babcock and Wilcox. They will operate the project as a joint venture. The new owners are committed to being good neighbors and cooperating with the local water users in the area.

In reviewing the water rights that SCA owns, Mr. Finlinson noted that only three have been subject to prior Temporary Change Applications because these rights

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represent their portion of the majority of the flow that is typically present in Grassy Trail Creek and their ownership of Big Springs. The fourth right is owned by East Carbon City, with SCA using the Dragerton Well under a Contract for Surplus Water Lease.

Mr. Finlinson made reference to the 1952 Memorandum Agreement which was executed by the various industrial users of Grassy Trail Creek, which are the predecessors of SCA, East Carbon City, and Sunnyside Coal Company. This agreement was signed prior to the construction of Grassy Trail Reservoir, and has been referred to as the Grassy Trail Reservoir Operating Agreement. This agreement dedicated each party's water rights for storage in the reservoir for the mutual benefit of the domestic, industrial, mining, and commercial interests in eastern Carbon County. The right being considered under this change application was owned at the time by The Denver and Rio Grande Western Railroad Company, who was not a party to the agreement. Historically, this right has been referred to as the Big Springs Ranch water right, and has been used to irrigate that property.

The applicant believes that this particular water right is not subject to the Memorandum Agreement dated January 3, 1952. The applicant plans to divert the available flow in Grassy Trail Creek at its power plant diversion, locally known as diversion Point #4 (referenced as #9 in paragraph one of this Memorandum Decision) for storage and use at the plant. The water may also be used at the ECDC Landfill.

If the Memorandum Agreement is followed, the applicant feels that unless Grassy Trail Reservoir is spilling or water is being released, the total flow of the creek below Grassy Trail Reservoir up to 5.575 cfs is available for their use under this water right. During periods when the total available flow is not needed for the plant, the remaining flow will be diverted downstream for use on the Big Springs Ranch by the Pillings, according to the terms of a Surplus Water Lease dated July 13, 1993.

Mr. Finlinson, in addressing the concerns of the protestants, indicated that the Whitmore Decree did not address livestock watering rights. He feels that this type of use occurred on Grassy Trail Creek when water was available. Probably the most dramatic change to affect this use occurred when Grassy Trail Reservoir was constructed in the mid 1950's. Since that time, the only water that is usually available if the reservoir is not spilling, is the second priority water right for the Big Springs Ranch. To his knowledge, this diversion (referenced as point #7 in paragraph one of this Memorandum Decision) has always been dry-dammed unless there was water over and above this right which has been allowed to flow down the creek.

In regards to the previously approved temporary change applications, the State Engineer has only allowed the consumptive portion of this right to be diverted for use at the power plant. The remainder of the right was to be left in the creek to provide the return flows which were available under the prior uses. Mr. Finlinson feels that this requirement alleviates any interference that might have occurred as a result of his client's totally consumptive use of the creek at the power plant.

Mr. Finlinson feels that it is unfortunate for all of the water users in the area to have had a prolonged drought to deal with, as well as the closing of the

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Sunnyside Coal Mine, which resulted in the pumps that dewatered the mine and augmented the flow of Grassy Trail Creek being turned off. He further indicated that it was not the applicant's intention to interfere with the rights of the protestant, however, this water is critical to the future of the applicant's power plant.

Dr. Paul Martinez, speaking in behalf of his protest, indicated that he recently purchased his ranch for year-round use in connection with his on-going cattle operation. The existing stockwatering rights associated with his property have an 1869 priority, which are senior to all of the applicant's water rights. In the past, the owners of SCA were difficult to work with. However, he is encouraged with the attitude of the new owners. Sometime ago, he had an agreement with Sunnyside Coal Company, to allow 50 gpm to be released at the Big Springs Ranch diversion, and allowed to flow down the creek to meet the needs of his livestock. However, other users would not honor the agreement, and as a result, the release has not occurred. At the present time, he is hauling water for his livestock and the wildlife in the area. He feels that this is a burden that he should not have to bear. He recognizes the applicant's efforts to comply with the State Engineer's requirement to allow water to pass diversion #4, however, the creek is dry-dammed at the Big Springs Ranch diversion, which is still a problem. He also indicated that several of his springs have quit flowing in the recent past. He suggested that all of the water rights of the applicant on Grassy Trail Creek should be restricted to diverting only at diversion point #4. All of the water that is by-passed at #4 would be available for livestock and other uses downstream. He indicated that he is not trying to be unreasonable, however, he feels that his senior water rights must be recognized.

Mayor Paul Clark, speaking in behalf of East Carbon City, feels that the Memorandum Agreement previously mentioned, is still valid and is binding on their heirs, which includes East Carbon City, SCA, and the Sunnyside Coal Company. He is concerned that some effort is being made to disband it, which would jeopardize the future water needs of the area. He also feels that the proposed new uses of this water should not be made at the expense of uses that were recognized in the past. Specifically, he referred to the hereafter explanation on this water right. He feels that reference to domestic uses for the town's purposes, and the industrial uses for coal mining should still be noted.

In regards to the protests of Dr. Martinez and the BLM, he indicated that the Christensen Decree affirms the Whitmore Decree, which did not recognize any senior livestock watering rights on Grassy Trail Creek.

Mr. A. Scott Loveless, representing the Bureau of Land Management (BLM) indicated that since the first temporary change applications were approved in 1993, the BLM has tried to monitor the potential effects of the applicant's water use on the water resources in the area. They are still concerned with what appears to be a permanent downward trend in the local aquifer that feeds numerous springs in the area, and of particular interest are Mud Springs and Big Springs. Natural flows continue to decrease, and have since the applicant began using water. Their monitoring efforts have been hampered because of the applicant's over pumping of Big Springs in 1994, and the total diversion of Grassy Trail Creek at point #4 in early 1995.

They are also concerned that the conditions imposed on the applicant by the State

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Engineer under the prior approved temporary change applications may not reflect the historic use of water and may be resulting in adverse impacts to the aquifer.

It was noted that in 1988, two ponds were renovated below Mud Springs in a cooperative project to enhance the storage of water for irrigation, wildlife, and waterfowl in the area. These ponds consistently stored water until 1994 when there was no water in storage, which they feel represents interference with Mud Springs. Mud Springs has been designated as a Public Water Reserve and must be protected.

Recently, it has been found that in order to meet BLM's water right needs on Grassy Trail Creek, water is needed from the Big Springs Ranch diversion to Highway 191, which is approximately five miles in length, where the drainages from Clark Valley confluence with Grassy Trail Creek. From this point these tributaries provide sufficient flow to the system to meet their needs.

The BLM is requesting that the State Engineer hold his decision on the permanent change applications for a period of three to five years. This would allow all of the concerned parties to continue to monitor the water resources in the area and hopefully help in making a more informed decision based on the data collected. The applicant would continue to operate under the conditions of the temporary change applications as long as the conditions imposed by the State Engineer are strictly adhered to. In addition, they would request that some flow be allowed to bypass the Big Springs Ranch diversion when water is present at that location. It was also suggested that potential impacts could be minimized if the hydrologic system was better understood. There may be times when using a particular source would not create a burden on the system as a whole.

In response to the protestants, Mr. Finlinson feels that his client is not obligated to release water for stockwatering purposes. As long as his client is not exceeding their rights, they will not interfere with the historic balance of the system. The conditions already imposed by the State Engineer should provide the protection that is needed.

Mr. Finlinson agrees with Mayor Clark, that all prior uses should remain on the various water rights for future use. He requested that the State Engineer so endorse the files.

In regards to the issues raised by the BLM, he does not agree with their explanation of the hydrologic system. He feels that the limitation imposed in the temporary change applications should be more than adequate to protect the rights of the other water users. He does acknowledge that Grassy Trail Creek provides recharge to the alluvial aquifer in the area.

After reviewing the testimony given at the hearing, from briefs submitted after the hearing, and information obtained at the prior hearing held on the first temporary change applications, it is the opinion of the State Engineer that the applicants are entitled to divert water from Grassy Trail Creek under this right. In considering the proposed changes, it is essential that they not create an enlargement of the right and the historic use of the water as it is currently understood. It is acknowledged that the Grassy Trail drainage has been experiencing serious shortages in water availability, however, limitations previously imposed on the applicant under the temporary change applications

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should not allow the applicant's use of water to negatively impact the historic use of water in the area by other users.

The State Engineer believes that Change Application Number 91-372 (a18520) can be approved without impairing other water rights particularly those of the protestants, if the previously imposed conditions are followed. Since the intended use of the water will be totally consumptive, limitations are needed to satisfy the historic return flow requirement. Because the historic uses of this water has supplied return flow to the hydrologic system, care must be taken to assure that the proposed power generation use does not create additional depletions to the system.

The issue raised by Mayor Clark, indicating that this water right is subject to the Memorandum Agreement, is not an issue that the State Engineer can address.

Water diverted under this right for the historic uses would be limited to the water available under this right. When water is diverted for power generation purposes, since this use is totally consumptive, water must be left in the creek to account for the return flows. The intent of the application is to divert water at diversion Point #4 for power generation purposes. To protect the downstream users, only 50% of the water in the stream or available under this right at diversion Point #4, whichever is the lesser amount can be diverted for power generation purposes. The amount of water available under the right would be determined by doubling the power diversion rate and adding any diversion for historic uses. When combined they must not exceed 5.575 cfs of water. Of the difference between the diversion rate and the right, only 50% can be diverted to a maximum of one-half of the flow available in the stream at diversion Point #4. In no instance shall the combined usage for power and historic purposes exceed 5.575 cfs. If all of the water under this right is diverted for power generation purposes at diversion Point #4, the amount of water available would be limited to the lesser of 2.788 cfs or one-half of the flow in the stream.

It is not the intention of the State Engineer in evaluating the various elements of the underlying right to adjudicate the extent of the right, but rather to provide sufficient definition to the right to assure that other vested rights are not impaired by the change and/or no enlargement occurs. If, in a subsequent action, the court adjudicates that this right is entitled to either more or less water, the State Engineer will adjust the figures accordingly.

It is, therefore, **ORDERED** and Change Application Number 91-372 (a18520) is hereby **APPROVED** subject to all prior rights and the following conditions:

- 1) Water used under this change application is approved for the uses as proposed in the change, but limited to a maximum diversion rate of 5.575 cfs from all diversions combined. Further, the right is limited on the amount of water that can be diverted for power generation purposes. Because of the totally consumptive nature of the power generation use, any water diverted for power generation must be restricted to 50% of the allowable direct diversion rate. If all of the water under this right is diverted for power generation purposes, the rate of direct diversion would be limited to 2.788 cfs or 50% of the water available in the stream, whichever is less. If the water is not all used for power generation, the water available for diversion for other uses could be determined by

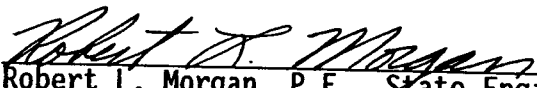
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doubling the amount of water being diverted under this right for power generation, and subtracting this number from the maximum allowable diversion rate of 5.575 cfs, or the flow which is available for this right. The difference could be used for other recognized uses.

- 2) The applicant must maintain the weir at diversion point #4 and the parshall flume in the pipeline located between the diversion and the Dragerton Reservoir. The applicant must take daily readings of the weir and flume, and this information must be made available to the State Engineer upon request.
- 3) The hereafter paragraph of this application includes uses the same as heretofore which would allow the prior domestic use for the towns, and industrial purposes for the coal mines and did not delete any of the prior uses in the filing of this change application.

This Decision is subject to the provisions of Rule R655-6-17 of the Division of Water Rights and to Sections 63-46b-13 and 73-3-14 of the Utah Code Annotated, 1953, which provide for filing either a Request for Reconsideration with the State Engineer or an appeal with the appropriate District Court. A Request for Reconsideration must be filed with the State Engineer within 20 days of the date of this Decision. However, a Request for Reconsideration is not a prerequisite to filing a court appeal. A court appeal must be filed within 30 days after the date of this Decision, or if a Request for Reconsideration has been filed, within 30 days after the date the Request for Reconsideration is denied. A Request for Reconsideration is considered denied when no action is taken 20 days after the Request is filed.

Dated this 15th day of December, 1995.

  
Robert L. Morgan, P.E., State Engineer

RLM:MPP:mw

Mailed a copy of the foregoing Memorandum Decision this 15th day of December, 1995, to:

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BY:

  
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Maclovio White, Secretary